

Book VI.
Title LVI.

As to the Tertullian senate decree.
(Ad senatus consultum Tertullianum.)

Bas. 45.1.36; D. 38.17; Inst. 3.3.¹

Headnote.

If, under the law of the twelve tables, a woman was in the power of her husband (in manu) she stood in the same relation to him as a daughter, and was entitled to inherit her deceased husband's property along with the children. If she was not in her husband's power as aforesaid fell out of use, she received nothing from his estate, even the praetorian law or subsequent statutory law giving her very little relief in that respect. This situation was to some extent mitigated through the system of dowry and prenuptial gifts which were customary under the Roman law, as shown in book 5 of the Code. A woman's dowry not infrequently came in the first place from her husband. Headnote C. 5.3. Upon the husband's death, she retained that as her property. C. 5.3.17. So a husband during the later times also generally put in an amount of property for the benefit of the family, called prenuptial gift. Justinian provided by Nov. 98² and 127, c. 3, that if upon the death of the husband the woman should not remarry, she should have the usufruct, and a proportionate part with the children. If she remarried, she got only the usufruct. The same rule applied reciprocally to the husband. Justinian further provided by Nov. 53 and 117 that an undowried woman should have a fourth of her husband's property, upon the latter's death.

The rights of a mother in the property even of her children who died intestate were very limited up to the time of the passage of the Tertullian senate decree, under the Emperor Hadrian in about 128 or 129 A.D. That emperor provided that a free woman who had three children and a freedwoman who had four children might inherit from such intestate children. Her rights were, however, subject to the rights of other persons. For children of such children, that is to say, grandchildren of the mother here mentioned had the first right. C. 6.55.11; Inst. 3.3.3. The father had formerly had the next right and the brothers and sisters of the decedent the next right; before the mother was entitled to inherit; law 2 of this title; Inst. 3.3.3. Justinian enlarged her rights considerably. He abolished the law which made her right to inherit depend on the number of children she had. C. 8.58.2; Inst. 3.3.4. And he permitted her to inherit along with the brothers and sisters of such deceased child. He also changed the rights of the father. In case he survived the child, he was required to share the usufruct in the child's property with the mother, in case the child had been emancipated. If the child had not been emancipated, he took, ordinarily, all the usufruct during his life, and she shared the fee with the children. Law 7 of this title and note.

¹ Blume penciled in to the margin here: "Prepared long before by right to bring Querella - same in C. 59; See Woess, Erbr. 233-4."

² Blume penciled a question mark in here.

6.56.1. Emperors Diocletian and Maximian to Viviana.

Although children may by themselves, if they can speak³, become heirs of their intestate mothers, there is no doubt that mothers can inherit from their children, although the latter died as infants.

Promulgated March 23 (291).

6.56.2. The same Emperors and the Caesars to Rhesa.

In connection with the inheritance from a son or daughter who die without children, and without brothers or sisters, the father who emancipated the child is preferred to the mother, since he still has his ancient right.⁴

Subscribed December 9 (294).

Note.

The present rescript deals with the inheritance of a manumitted (emancipated) child, the father and mother both surviving. In such case, as stated here, the father was preferred to the mother. Under the ancient law he had the preference right to inherit, if the manumitted child did not leave descendants - they having the first right. But the present law was changed by Justinian who provided that the brothers and sisters of such child should, in case of death without descendants, be entitled to the fee of the property and one-third of the usufruct from the beginning, the father and mother sharing two-thirds of the usufruct thereof during their lives. Law 7 of this title. Buckland 373.

6.56.3. Emperor Constantine to Catullinus, Proconsul of Africa.

It is certain that mothers who have lost sons over the age of puberty, though they did not ask for guardians for them while still below the age of puberty, cannot be excluded from their inheritance by setting up the plea of such failure to ask for guardians for them.

Given July 27 (315).

Note.

Justinian, in Inst. 3.3.6, provided: "But while we are legislating for mothers, we ought also bestow some thought on their offspring; and, accordingly, mothers should observe, that if they do not apply within a year for guardian for their children, either originally or in lieu of those who have been removed or excused, they will forfeit their right to succeed such children if they die under the age of puberty." The case was otherwise, as above noted, if the child died while over the age of puberty; that is to say, the fact that they had not asked for a guardian did not, in such case, make any difference. See also C. 6.58.10, and C. 5.31 8. And the rule did not apply if the mother was a minor. C. 2.34.2.

6.56.4. Emperors Gratian, Valentinian and Theodosius to Eutropius, Praetorian Prefect.

³ [Blume] If the child could not talk, the inheritance was required to be accepted either by a father or a guardian; even if the child was over seven years of age, but under the age of puberty either the consent of the father or guardian was necessary for such acceptance. C. 6.30.18 and note.

⁴ Blume penciled in here: "See 6.61; note 6.59.11."

If a woman shows no respect for her first husband by whom she had no sons and daughters by entering into a second marriage, she becomes infamous pursuant to a well-known law, unless that stain is blotted out by an imperial rescript. 1. If she has sons or daughters, and she has imperial indulgence, we permit the remission of the infamy and the annulment of the other ancient penalties, provided that she shall give to her son and daughter, or sons or daughters the half of all property existing at the time of her second marriage, which she received from her former husband, giving it unconditionally, with every formality necessary for a gift, and without retaining even the usufruct thereof. 2. If she gives this half to two or more sons or daughters, and one or more of them die intestate, the property shall belong to the survivors. 3. If all of them die intestate, the property shall revert in its entirety to the mother, as a solace for her misfortune; so, forsooth that she shall again be entitled to this half which she gave to the sons and daughters, from the inheritance of the last survivor, who dies intestate, as her special property.

Promulgated December 18 (380).

Note.

The present law deals with second marriages by a woman before the expiration of twelve months, after the death of her first husband; that is to say, before the period of mourning. That subject is dealt with at various places in the Code and the Novels.

C. 2.11.15, a rescript of the year 239 A.D., provides that such woman, together with her second husband, shall become infamous, if they intermarry before the expiration of the time of mourning. The present law is also found, substantially as here stated, in C. 5.9.1. Further provisions on the same subject and somewhat more in detail are found in Novel 22, c. 22, and Novel 39, c. 2, appended to C. 5.9 - a title which generally deals with second marriages, which are frowned upon.

6.56.5. Emperors Theodosius and Valentinian to the senate of the city of Rome.

If a mother succeeds to the property of a deceased son or daughter who leaves no children, either under a testament or on intestacy, and does not, after the death of the son or daughter, enter into a second marriage, she holds such property, received through the death of the child, by complete ownership. 1. But if she chooses to ally herself to another husband, she shall, forsooth, have the same right in the property acquired by such son or daughter from outside sources, but, from humanitarian considerations, shall only have the usufruct of the property of the decedent which was derived from the father. The property itself shall belong to the surviving sisters, and brothers of the decedent.

Given at Ravenna November 7 (426).

C. Th. 5.1.8.

Note.

The preceding law dealt with a second marriage by a woman before the death of her children. The present law deals with her second marriage, after the death of a child, and makes a distinction between the property which she, upon the death of the child, inherited under the laws. If that property came from the father of the child, she took only a usufruct therein, the ownership remaining in the brothers and sisters of the decedent - the decedent leaving no children, who would have the first right - while in her portion of the property that came to the child from other sources, she received not only the usufruct by also the ownership. C. 5.9, and the Novels relating thereto, deal extensively with the

subject of second marriages by women, including their right to inherit from children in such event. Novel 2, repealed the present law, providing that remarriage should make no difference in her right to inherit. But Novel 22, cc. 46 and 47, practically reinstated the present law, providing that a woman, though remarried, could take whatever was given her in a testament; but that in case a child died intestate, leaving no children, she inherited an equal portion along with the brothers and sisters of the decedent, except that she could take only a usufruct in the property which was derived from the father. See also C. 5.9.3. It may here be noted, as it is expressly stated at Novel 22, c. 46, that this property derived from the father has no reference to a prenuptial gift though that, too, was derived from the father and concerning which special provisions were made in C. 5.9.6.4, and Novel 98.

6.56.6. The same Emperors to Florentius, Praetorian Prefect.

In case a son below the age of puberty dies, we want his mother to be denied the right to inherit from him either on intestacy or by any right of substitution, if she undertook the legal guardianship of her children, but entered into a second marriage in violation of her oath⁵, before causing another guardian to be appointed and paying him the amount due on account of her management of the guardianship. Given at Constantinople July 10 (439).

6.56.7. Emperor Justinian to Mena, Praetorian Prefect.

If anyone, male or female, dies intestate, leaving surviving a mother, and a brother who is the successor under the civil law or who has the sole right of blood-relationship, the mother cannot be excluded from the inheritance of such child, but she shall inherit along with the brother of the deceased, whether the latter is her own son or her stepson, the same as though she were a sister of the decedent. If, the only survivors of the deceased are sisters, agnatic or cognatic, and a mother, the mother takes one-half according to the tenor of the ancient laws, and the sisters, jointly, take the other half. But if anyone should die intestate, leaving as survivors the mother and one or more brothers, or one or more brothers as well as sisters, the inheritance shall be divided per capita, and the mother shall claim no greater part than her proportionate share per capita, simply because among the heirs are sisters of the decedent. The paternal uncle of the deceased and, in case of his death, his son or grandson, shall have no right to the inheritance, when the decedent leaves his or her mother surviving, and her share shall not be reduced pursuant to any ancient laws or constitutions. 1. If the decedent, moreover, was not under paternal power (*sui juris*) and leaves surviving him or her not only a mother and brothers and sisters, but also a father, then, in order to look after the interests of all, and though (ordinarily) the father has preference over the mother, the brothers and sisters of the deceased shall alone be called to the succession of the property, so far as the fee is concerned, each taking an equal portion, and the father and mother shall have the usufruct of two-thirds of the inheritance, to be equally divided between them, the remaining portion of the usufruct to belong to the brothers and sisters. 2. But if he decedent died

⁵ [Blume] The oath here referred to is mentioned in C. 6.35.2, in the note to which the present law is mentioned. That oath was dispensed with by Nov. 94, and by Nov. 118, c. 5. The penalty here mentioned was, however, retained in force. The present law is also mentioned in Nov. 22, c. 40.

while in his father's power, the father will inherit the usufruct of all of the property, which he also had during the life of the child, and since the mother cannot, in such case, have any of the usufruct during the father's lifetime, the whole of it, as stated, belonging to the father, she shall inherit the fee of the property equally with the brothers and sisters of the decedent; that is to say, if there are sisters only, the half thereof; if there are one or more brothers, or in addition thereto a sister or sisters as well, the same portion which each of them receives, according to the method of distribution above mentioned. 3. All provisions, moreover, enacted concerning women who enter into a second marriage, shall remain in full force.

Given at Constantinople June 1 (528).

Note.

It will be noted that where a child died without leaving children, but died leaving sisters alone, and a mother, the mother inherited a half of the property; while if the child died leaving brothers, or brothers as well as sisters, and a mother, all inherited equally. This point was amended by Novel 22, cc. 46 and 47, appended to C. 5.9, providing that in any case the mother could only inherit an equal portion with any brothers or sisters of the decedent. As shown there, if the child died leaving a testament, the mother could inherit the portion left her therein.

Rights of father in property left by children.

Formerly the property of an emancipated child was inherited by the father, if the child left no descendants. Law 2 of this title and note. So, too, formerly, the property of an unemancipated child, living or upon death, belonged absolutely to the father having paternal power over the child, except only as that right might be affected in connection with contracts for dowry or a prenuptial gift given to a married child. But changes in that right of the father were made from time to time as clearly shown in the headnote to C. 6.60, and the law there mentioned, and ultimately he lost all rights in the special military or quasi military property of the child, and all rights in other property acquired by the child from outside sources - that is to say, sources other than the father - except only the usufruct therein during his life. At times he lost even the usufruct. C. 6.61.7. He retained his former rights, however, in property which the child acquired from him as dowry or prenuptial gift. C. 6.61.2. See, generally, Buckland 372, 373.